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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-105

GOLDEN EAGLE, ALSO KNOWN AS LEE ROY AUSTINE,
PETITIONER

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORN AND KIT NELSON,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	8
I. WHETHER USE AND POSSESSION OF PEYOTE MAY BE PROTECTED UNDER THE FIRST AMENDMENT IS A SUBSTANTIAL FEDERAL QUESTION NOT YET DETERMINED BY THIS COURT	8
II. WHETHER THE ARREST OF PERSONS EXERCISING FIRST AMENDMENT RIGHTS OF RELIGIOUS FREEDOM MUST BE PRECEDED BY CERTAIN SENSITIVE PRE-ARREST SAFEGUARDS IS A SUBSTANTIAL FEDERAL QUESTION NOT YET DETERMINED BY THIS COURT	10
III. PERSONAL RELIGIOUS ARTICLES WHICH ARE NOT CONTROLLED AND WHICH ARE NOT NECESSARY TO IDENTIFY AN ACCUSED MAY NOT BE SEIZED IN CONNECTION WITH AN ARREST	13
CONCLUSION	14
APPENDIX A: COURT OF APPEAL DECISION	1
APPENDIX B: UNITED STATES DISTRICT COURT ORDER ON DEFENDANTS' MOTION TO DISMISS, AUGUST 20, 1971	21

APPENDIX C: UNITED STATES DISTRICT COURT ORDER FOR ENTRY OF FINAL JUDGMENT 23

TABLE OF AUTHORITIES

CASES	PAGE
A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964)	12
Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)	14
Heller v. New York, 413 U.S. 483 (1973)	12
In re Grady, 61 Cal.2d 887, 39 Cal.Rptr. 912, 394 P.2d 728 (1964)	9
Marcus v. Search Warrant, 367 U.S. 717 (1961)	12
People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964)	9,11,14
Roaden v. Kentucky, 413 U.S. 496 (1973)	12
Sherbert v. Verner, 374 U.S. 398 (1963)	9
United States v. Seeger, 380 U.S. 163 (1965)	11
Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)	13

CONSTITUTION AND STATUTES

	PAGE
U.S. Constitution, Amendment I	5
U.S. Constitution, Amendment IV	5
U.S. Constitution, Amendment XIV	5
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	3
Universal Military Training and Service Act, 50 U.S.C. App. §§451-473	11

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Petitioner Golden Eagle, also know as Lee Roy Austine, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 15, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 493 F.2d 1179. The orders of the District Court for the Eastern District of California dated August 20, 1971 and March 16, 1972 are unreported. The opinion of the Court of Appeals and the orders of the District Court are appended to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 15, 1974. On June 7, 1974, Mr. Justice Douglas signed an order extending the time for filing this petition for certiorari to and including August 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is use and possession of peyote a protected religious sacrament?

2. Was petitioner entitled to pre-arrest safeguards by reason of the due process clause

of the Fourteenth Amendmant to the Constitution, where bona fide religious use of peyote must be established to secure an exception to the criminal sanctions otherwise applicable, requiring at a minimum a reasonable pre-arrest investigation, the necessity of a warrant, and a pre-arrest adversary hearing?

3. Was the seizure of petitioner's personal religious articles illegal, whether or not his arrest was valid?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 42:

> §1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

United States Code, Title 42:

> §1985. Conspiracy to interfere with civil rights (3) If two or more persons

in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support of advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived

of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner in this case is Golden Eagle, a Navajo Indian and a member of the Native American Church. Central to the practice of his church is the worship and ingestion of scaramental peyote. Petitioner was arrested for possession of peyote on the night of July 11, 1971, after the car in which he was riding had been stopped for a defective license plate light. He candidly told respondent California Highway Patrol officers that a symbolically inscribed wooden box belonging to him contained sacramental peyote along with other ritual paraphernalia. Petitioner further explained that the peyote was a sacrament taken during religious ceremonies of the Native American Church. His candid admission of possession was prompted by his belief that his possession of peyote

was protected by the United States Constitution.

Respondents Peters and Heerd, joined by respondents Deputy Sheriffs Hall and Johnson, then proceeded to search the car and seized the box of religious paraphernalia containing the peyote. At the time of his arrest and during the booking procedure at the Mojavi jail facility at Tehachapi, California, petitioner repeated his request to the arresting officers to check out his claim of bona fide religious use of peyote by calling his landlady or church leader. He was permitted to call his landlady who told jail officials that Golden Eagle's church membership could be verified by contacting a named church leader. Respondent officers and jail officials made no effort to investigate the claim of bona fide religious use of peyote. After 31 days in jail, Golden Eagle's bail was reduced and friends were able to secure his release. During his incarceration, Golden Eagle was repeatedly harassed and humiliated by his jailors and pressured to plead guilty to a lessor offense both by his public defender and the judge who presided at his arraignment and preliminary hearing. He continued to insist on his immunity and request that the charges be dropped or he

be given a jury trial. He was finally bound over for jury trial in the Superior Court of the State of California in and for the County of Kern. Criminal charges were dismissed in the interest of justice at the request of the District Attorney on the morning of trial.

This action was commenced on November 17, 1970. Much of the matter on the face of the complaint was rendered moot by the dismissal of criminal charges against Golden Eagle. Petitioner continues to assert that the acts and conduct of the arresting officers denied him the right freely to exercise his religion and deprived him of due process of law. He also asserts that the seizure of his personal articles not consisting of contraband, deprived him of the right to be free of such unlawful seizure under the Fourth, and Fourteenth Amendments to the Constitution.

The district Court dismissed these claims and the Court of Appeals for the Ninth Circuit affirmed. The opinion of the Court of Appeals is reported at 493 F.2d 1179 (9th Cir. 1974).

REASONS FOR GRANTING THE WRIT

I

WHETHER USE AND POSSESSION OF PEYOTE MAY BE PROTECTED UNDER THE FIRST AMENDMENT IS A SUB-

STANTIAL FEDERAL QUESTION NOT
YET DETERMINED BY THIS COURT

This court has held that a State may not abridge religious freedom without demonstrating that a compelling state interest in regulating the conduct in question outweighs the Constitutional protection of religious freedom. Sherbert v. Verner, 374 U.S. 398 (1963). In 1964, the California Supreme Court, applying Sherbert, supra, held that use of peyote for bona fide religious purposes was protected by the First Amendment, and that no compelling state interest justified regulation of that use. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964).

Necessairly the immunity for religious purposes granted by People v. Woody, supra, also extends to the possession and transportation of peyote. The peyote cactus which provides the sacrament taken at the services held on reservations must be collected or purchased and prepared and distributed before it can be used.[1]

1. See In Re Grady, 61 Cal. 2d 887, 39 Cal. Rptr. 912, 394 P.2d 728 (1964), where habeas corpus was granted to allow the defendant to assert his religious defense although the peyote was not being used in a religious ceremony at the time of his arrest.

II

WHETHER THE ARREST OF PERSONS EXERCISING FIRST AMENDMENT RIGHTS OF RELIGIOUS FREEDOM MUST BE PRECEEDED BY CERTAIN SENSITIVE PRE-ARREST SAFEGUARDS IS A SUBSTANTIAL FEDERAL QUESTION NOT YET DETERMINED BY THIS COURT.

An Indian in possession of peyote for religious purposes is placed by the State of California in a anomolous position. He has a right to use it, but he still may be arrested for its possession and be subject to a long period of detention, even though charges are eventually dropped. He may be arrested without a warrant and charged with felony possession of peyote, while on his way to a religious meeting. An officer, motivated perhaps by a belief that there should be no exception, religious or otherwise, to the drug laws, and by a contemptuous attitude toward Indian people, may subject such persons to humiliation and inconvenience of arrest with no consideration of the religious issue. Even a person who is eventually successful in maintaining his innocence will still have a felony arrest record which can prevent being considered for jobs.

Golden Eagle therefore maintains that there can be no compelling interest of the State in preventing the institution of certain

sensitive pre-arrest procedural safeguards in this very narrow and unique area to prevent the threat of arrest without a warrant from intimidating and deterring members of the Native American Chruch from practicing their religion.[2]

Sensitive pre-seizure procedures have been instituted in other First Amendment con-

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2. The test in Woody is similar to that applied in the case of consientious objection to war: whether the belief professed is sincerely held. See United States v. Seeger, 380 U.S. 163, 185 (1965). The Universal Military Training and Service Act, however, provided that the threshold question of the sincerity of a religious claim of exemption would be reviewed administratively by Draft Appeal Boards, Department of Justice hearing officers, and investigated by the Federal Bureau of Investigation. Thus, before the person practicing the religious belief in pacifism was to be subjected to a criminal arrest and prosecution for refusal to be inducted, he was entitled to numerous procedural safeguards to assist in determining the validity of his exemption. Similarly, petitioner contends herein that before his religious activity is the subject of arrest and prosecution, due process entitles him to some administrative examination of the validity of his claim of exemption from application of the law, in the form either of some reasonable minimum investigation of the facts in support of his claimed belief, or of the requirement of a warrant or pre-arrest adversary hearing.

texts without greatly inconveniencing law enforcement officials or invalidating prior convictions. Such procedures have been evolved by the courts to protect freedom of speech. It has been held by this court that a prior adversary hearing on the question of obscenity is constitutionally required to prevent a prior restraint on free expression before the seizure in a civil, in rem proceeding, concerning large amounts of books. A Quantity of Books v. Kansas, 378 U.S. 205 (1964), Marcus v. Search Warrant, 367 U.S. 717 (1961).[3]

The free exercise of religion involved herein is threatened and intimidated by arrests and seizures. An important cultural ritual of a substantial number of Native Americans is

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3. This Court has recently held that a prior adversary hearing is not an absolute First or Fourteenth Amendment right in all cases where allegdly obscene material is seized, if that material is seized pursuant to a warrant issued after a determination of probable cause by a neutral magistrate and if an expedited hearing on the question of obscenity is made available promptly after seizure. Heller v. New York, 413 U.S. 483, (1973). However, it is still the rule that a precipitous seizure by a police officer acting on his own judgment without a constitutionally sufficient warrant is unreasonable under Fourth Amendment standards. Roaden v. Kentucky, 413 U. S. 496, (1973)

chilled and curtailed. If practice of the religion is protected, a full and meaningful protection should be afforded. The right to practice the religion of the Native American Church should not be a right which each member may be forced to defend in Court. Some pre-arrest safeguards are necessary to avoid a chilling effect on this religious practice.[4]

III

PERSONAL RELIGIOUS ARTICLES WHICH ARE NOT CONTRABAND AND WHICH ARE NOT NECESSARY TO IDENTIFY AN ACCUSED MAY NOT BE SEIZED IN CONNECTION WITH AN ARREST.

The seizure of petitioner's personal religious articles was also illegal. These items (with the exception of the peyote) were not contraband and there was no probable cause for their seizure, whether or not petitioner's arrest was valid. Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967). There was no nexus between the religious box

4. A police officer need not allow someone he suspects is not a bona fide practicioner of a religious faith simply to walk away. If he does not have a warrant, issued after a judicial determination of probable cause, he may take the suspect into custody and impound the peyote until this determination can be made.

and its ritual contents other than the peyote and criminal behavior. Certainly these items were not needed to identify petitioner. Petitioner contends that the only possible purpose for seizing and retaining these highly personal and sacred implements was to hold up to ridicule an "Indian religion" and harass and humiliate petitioner and his race. He has stated a claim for relief under the Civil Rights Act. Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit should be reversed. The sacramental use of peyote by a bona fied member of the Native American Church, which is protected in California under People v. Woody, supra, necessarily requires and should include minimal pre-arrest safeguards. Without such safeguards the First Amendment protections are meaningless.

Dated: August 12, 1974

Respectfully submitted,

BRUCE R. GREENE
WILLIAM P. LAMB
RAYMOND CROSS
CALIFORNIA INDIAN
LEGAL SERVICES

By: _____
Bruce R. Greene

APPENDIX A

GOLDEN EAGLE, also known as Lee Roy Austine, Appellant,

v.

Deputy Sheriff JOHNSON et al., Appellees.

No. 72-1820

United States Court of Appeals, Ninth Circuit.

March 15, 1974.

Before TRASK and SNEED, Circuit Judges, and LINDBERG,* District Judge.

SNEED, Circuit Judge:

Golden Eagle, also known as Lee Roy Austine, brought this action, pursuant to 42 U.S.C. §§1981, 1983, 1985 and 1988 and 28 U.S.C. §2201 and §2202, seeking to have (1) certain laws of the State of California declared unconstitutional, (2) certain criminal proceedings in the California courts enjoined, (3) certain records destroyed, and

* Honorable William J. Lindberg, Senior District Judge, Western District of Washington, sitting by designation.

(4) a recovery of damages from the defendants, who were the officers who arrested Golden Eagle, his jailers, various judges, prosecuting attorneys, and the public defender.

The complaint set forth what was described therein as seven causes of action. The defendants moved to dismiss the entire complaint and this motion was granted except as to the seventh cause of action. In accordance with Rule 54(b), Federal Rules of Civil Procedure, the trial court determined that there was no just reason for delay in the entry of a final judgment with respect to these causes of action and entered a final judgment with respect to them. The issue before us is whether this dismissal of six of the seven causes of action was proper. We hold that it was.

For the purposes of this decision, we assume the truth of the facts as alleged in Golden Eagle's complaint. On the evening of July 11, 1970, Golden Eagle was returning from the Navajo Indian Reservation to his home in Los Altos, California in an automobile driven by Patrick Joseph Ryan. In his possession at that time were sacramental peyote, a wooden box containing other religious paraphernalia, and certain drugs sold to him on prescription which were used to treat his

epilepsy. Between 10 p.m. and midnight the automobile was stopped by Officers Peters and Heerd of the California Highway Patrol because it lacked a license plate light and because the officers observed "furtive movements" in the vehicle.

After being stopped, Ryan could not provide satisfactory identification and the officers determined that the vehicle belonged neither to Golden Eagle nor Ryan. A search of the vehicle was initiated, allegedly so that the vehicle could be stored. Golden Eagle was asked by an officer what was in the wooden box and he responded by explaining that he was a member of the Native American Church, that the box contained religious paraphernalia, and that he had a constitutional right to use sacramental peyote for religious purposes.

Golden Eagle was handcuffed and forced to kneel on the ground. The officers, assisted by Deputy Sheriffs Hall and Johnson who had reached the scene, then conducted a through search of the vehicle without the consent of either Golden Eagle or Ryan. During this search the prescription drugs, the sacramental peyote, and the wooden box containing religious paraphernalia were

seized by Hall and Johnson.

Following the search, Golden Eagle and Ryan were transported to the Mojave jail facility at Tehachapi, California. At that time, Golden Eagle again informed members of the Kern County Sheriff's Department that he was a member of the Native American Church and as such he had a right to have sacramental peyote in his possession. Golden Eagle was permitted to call his landlady, and she told jail officials that he was a member of the Native American Chruch, that his membership could be confirmed by asking a church official whose name she supplied, that he suffered from epilepsy, and that this could be verified by taking him to a hearby hospital. No effort was made by anyone to follow up on these suggestions. About 6:45 a.m. on July 12, 1970, Golden Eagle and Ryan were transferred to the Kern County jail in Bakersfield. Again Golden Eagle's landlady called and made suggestions regarding the manner in which Golden Eagle's membership in the Native American Church and his right to use sacramental peyote could be verified.

The complaint continued by alleging Golden Eagle's incarceration in the Kern County jail for thirty-one days and certain events which allegdly occurred during that

period. A recital of these allegations is not necessary here because counsel for Golden Eagle conceded in his brief and in oral argument that only with respect to the first and sixth causes of action was the motion to dismiss impromerly granted. Both of these causes are based on the allegations described above. It was acknowledged by counsel for the plaintiff that all criminal charges against the plaintiff had been dropped before trial and that this rendered moot all claims against the judges, prosecuting attorneys and public defender. This disposed of the second and third causes of action. The fourth and fifth causes of action were also recognized as moot except to the extent such causes were also embraced by the first and sixth causes. The seventh cause of action, which involves claims against certain jailers, is not involved in this appeal.

The first cause of action charges that Officers Peters and Heerd, Deputy Sheriffs Hall and Johnson, Deputy District Attorneys for Kern County Robinson, Rostain, and Vandernoor, and Assistant District Attorney for Kern County, Bradshaw arrested, booked, and charged Golden Eagle for violation of §11910 (superceded by §11377 of the 1972 California Uniform Controlled Substances Act) of the

California Health and Safety Code by possessing peyote, a drug restricted by §11540 (superceded by §11363 of the 1972 California Uniform Controlled Substances Act) of the California Health and Sagety Code,[1] in bad faith and for the purpose of denying him the right to freely exercise his religion.

The sixth cause of action asserts that Officers Peters and Heerd and Deputy Sheriffs Hall and Johnson deprived Golden Eagle of property without due process of law by seizing and retaining the prescription drugs, the sacramental peyote, and the wooden box and its religious contents.

Precision is given these general allegations by the briefs and oral argument of the counsel for Golden Eagle. In essence, it is Golden Eagle's contention that under the First and Fourteenth Amendments of the Constitution of the United States an arrest for the possesison, and the seizure, of peyote should be preceded by an adversary hearing before a judicial officer to determine whether such possession was for a bona fide

1. Under the California Uniform Controlled Substances Act peyote is a Schedule I substance, §11054, and possession of such a substance is made unlawful under §11350. Planting, cultivating, and harvesting of peyote is proscribed by §11363.

religious purpose. An alternative pre-arrest and pre-seizure procedure required by these Amendments, asserts Golden Eagle, might be a warrant issued by a judicial officer on the basis of an ex parte showing that there is probable cause to believe that the possession and use was not for bona fide religious purposes. At a minimum, Golden Eagle urges that the First and Fourteenth Amendments require an arresting officer to make an effort to check the good faith of the religious claims of one found in possession of peyote before placing him under arrest.

Golden Eagle argues that one of these procedures is necessary to reduce the "chilling effect" of the possibility of arrest on the free exercise of religion by a member of the Native American Church. He points to the Supreme Court's requirement, fashioned in A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed2d 809 (1964), that an adversary hearing precede seizure of allegedly obscene material as recognition that sensitive procedural tools must be devised to safeguard against the infringement of First Amendment rights. He then asserts that the State of California in People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813

(1964), has recognized that the use of peyote, in the bona fied pursuit of a religious faith, is entitled to First Amendment protection. It follows, he continues, that pre-arrest and pre-seizure sensitive procedural tools also must be designed to minimize interference by the state with the bona fide use of peyote in the exercise of the religious faith of those who accept the teachings of the Native American Church. At least one of the procedural devices, he suggests, is constitutionally required.

Golden Eagle does not contend that his arrest was in any way improper absent such a constitutional requirement. Nor does he, despite the allegation of bad faith in the first cause of action, assert in his briefs or oral argument that the officers and deputy sheriffs believed that his arrest and the seizure of the box and his personal religious articles was unconstitutional. He does, however, assert that in all events the seizure violated the Fourth and Fourteenth Amendments.

As we understand it, the adversary hearing which Golden Eagle would have imposed by the First and Fourteenth Amendments in the context of the facts of this case would have operated to require that the arresting

officers take him into "protective custody" and "impound" the articles here seized pending a prompt hearing before a judicial officer to determine whether a bona fide religious purpose exists. Should the determination favor the person asserting such purpose, his release and the lifting of the impoundment would follow with the consequence that no record or arrest would exist. A contrary determination would lead to arrest and seizure, but it would not, of course, foreclose another determination of the good faith of the religious purpose at later stages of the criminal process.

The warrant procedure, suggested by Golden Eagle as the "second best" protection, envisions an ex parte hearing in which the possibility of bona fide use for religious purposes might be shown to be remote in the course of establishing probable cause for arrest or search and seizure. Golden Eagle's least preferable form of protection, a check by the apprehending officers of the good faith of the asserted religious purposes prior to arrest and seizure, also contemplates limited "protective custody" and "impoundment."

We hold the dismissal of the first and sixth causes of action was proper. We start

with the proposition that neither the Supreme Court of the United States nor this Court has extended First Amendment protection to the religious use of peyote by the members of any church. See Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir., 1972). Despite the opportunity that this case provides to pass on this issue, we decline to do so. To reach the issues which this case presents we will assume, without deciding, that the interpretation of the First Amendment appearing in People v. Woody, supra, is proper. We do this recognizing that our unwillingness to give an authoritative interpretation of the First Amendment as it relates to the religious use of a controlled substance such as peyote deprives our holding in this case of the underlying doctrinal commitment necessary to infuse it with maximum authority. Nonetheless, our notions of judicial restraint outweigh this consideration.[2]

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2. Analytically it would be possible for us to avoid assuming the correctness of People v. Woody by framing the issue before us as calling for a decision whether the interpretation of the First and Fourteenth Amendment which that case reflects, it being one not presently accepted by the federal courts, necessarily imposes upon California a burden, derived from the Due Process Clauses of the Fifth [footnote continued on next page]

It follows from our assumption of the correctness of People v. Woody, supra, that we adopt for the purposes of this case the weights assigned to competing values by the California Supreme Court. Thus, the degree of danger to the state arising from the religious use of peyote is assumed by us to be outweighed by freedom of religion as protected by the First Amendment. We also accept, arguendo, the California Supreme Court's determinations that the religious use of peyote does not lead to the use of more harmful drugs, that peyote is not used by Indians in place of proper medical care, that its religious use does not corrupt children nor obstruct enlightenment, and that immunity from prosecution for the religious use of peyote will not render impossible the effective enforcement of the narcotics laws of California. Finally, we will assume, but not decide, that People v. Woody, supra, affords protection to those

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Amendment and the Fourteenth Amendment, to provide at least one of the procedural safeguards urged by the Plaintiff. To so frame the issue, however, would require the examination of perhaps an ever more intriguing constitutional issue than that posed to us by Golden Eagle. Because we are very doubtful that the result should be different without regard to the manner in which the issue is framed, we prefer the more conventional framing of the issue which this opinion reflects.

who possess and transport peyote on a public street or road when their purpose for doing so is directly to facilitate the exercise of their good faith religious beliefs.

Our task is to confront issues not before the Supreme Court of California in People v. Woody, supra, viz. the scope of the unique sensitive prodedural rules, if any, which constitutionally must precede the arrest of a person in possession of peyote and a seizure of the peyote and other articles with respect to which a proper "nexus" exists. See Warden v. Hayden, 387 U.S. 294, 309, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1966)

As already indicated, the authority for the imposition of such unique rules is derived from the restrictions imposed by the Supreme Court of the United States on the seizure of obscene and allegedly obscene material. A Quantity of Books v. Kansas, supra; Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Scholars have also suggested that such rules be extended to other First Amendment areas. See, e. g., Monaghan, First Amendment "Due Process", 83 Harv.L.Rev. 518 (1970).

We believe, however, that the unique and sensitive procedures applicable to seizures of allegedly obscene material were

designed more for the special purpose of protecting a right of the public than to protect the rights of the person from whom the allegedly obscene material was seized. Seizure of allegedly obscene material prior to any determination of obscenity by means of an adversary hearing will result inescapably in the suppression of large numbers of nonobscene books. The public has a First Amendment right to the unimpeded flow of nonobscene books. The usual safeguards provided by our constitutionalized criminal procedure to an accused can not protect, in the obscenity area, this right of the public. Additional tools are necessary and these have been devised. Mr. Justice Brennan underscored this reason for such tools when he observed, "For if seizure of books precedes an adversary determination of their obscenity, there is a danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." A Quantity of Books v. Kansas, 387 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 (1963).

In this case there is no corresponding right of the public that can not be protected by the usual rules relating to arrest and to search and seizure. The arrest of the

plaintiff in this case and the seizure of the peyote does not deprive other members of the Native American Chruch of the opportunity to practice their faith. There is no allegation is either cause of action before us that the peyote and religious paraphernalia seized from Golden Eagle are necessary to the practice by others of the faith they share with the plaintiff. Other supplies of such articles presumably exist in relative abundance. Any impairment of the free exercise of religion by others that exists flows from the "chilling effect" of the arrest of their fellow worshiper. The issue is whether the First Amendment requires an effort to reduce this "chilling effect" by utilizing any of the special procedures upon which the plaintiff insists.

We derive support for our holding that no such requiremnet exists from three sources. The first is Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D.N.Y.1969), aff'd. 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where a three judge district court refused to extend the pre-seizure adversary hearing requirement to arrests of those accused of promoting the sale of obscene material. It was recognized that such arrests have a "chilling effect", but the court

correctly observed that an adversary hearing itself would have a similar, or possibly greater, effect. Customary procedural safeguards available to an accused in a criminal proceeding, in the view of the court, were "surely permissible, and very probably preferred vehicles for enforcing bans against obscenity." 305 F.Supp. at 297. At least with respect to arrests for the possession of peyote, this reasoning is very pursuasive, if not conclusive. So long as an effort is made to enforce the laws of California relating to peyote, there is no way to avoid a "chilling effect" on those whose use of peyote is entitled to First Amendment protection by reasons of People v. Woody. Indeed, as Milky Way Productions, Inc. suggests, pre-arrest adversary hearings could be used so indiscriminately as to increase the barriers to the free exercise of religion by the members of the Native American Church beyond those which exists under present procedures. Given this possibility, surely it is permissible in this area to rely upon customary criminal procedure to provide the means by which constitutional claims are made.

Our second source of support is People v. Woody, supra. It nowhere indicates

that ordinary criminal procedures were to be altered in a questionable effort to reduce further the "chilling effect" of California laws relating to peyote. Nor is there to be found any suggestion that such laws should not be enforced in the interest of eliminating any trace of a chilling effect. In answering the Attorney General's argument that First Amendment protection of the religious use of peyote would involve the courts in a case by case inquiry into the good faith of the religious beliefs of the particular defendant, the court said:

> In so doing, we impose no undue burden upon the trier of fact. We do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it. 40 Cal.Rptr. at 77, 394 P.2d at 821.

Certainly belief on the part of the Supreme Court of California that its decision would require the special procedures urged on us by the plaintiff should have been revealed, or at least intimated, at this point. It was not, and that court concluded the portion of its opinion in which the above quotation appears by observing that a factual determination of the bona fides of

a religious belief was not a unique judicial burden, it being required in other areas of the law, and did not "intrude into the religious issue at all." 40 Cal.Rptr. at 77, 394 P.2d at 821.

We can not escape the conclusion that the Supreme Court of California assumed that prosecutions for the possession and use of peyote would call for no special or particularly unique procedures. This assumption, of course, is not controlling in this case, but it is highly persuasive.

Its persuasiveness is enhanced by the third source of support for our holding, viz. the criminal procedure of California. The requirement of an expeditious hearing before a magistrate, West's Ann.Penal Code, §§822, 825, 849, without regard to whether the arrest was with or without a warrant, the opportunity to set aside an indictment or information, West's Ann.Penal Code, §995, and the procedure provided for securing the return of property improperly seized, West Ann.Penal Code, §1538.5, afford assurance that a determination of the good faith of a member of the Native American Church and a return of any sacred objects seized from him can be speedily resolved when the facts permit. These procedures

will not yeild in all instances a final disposition of the good faith issue. Only a trial on the merits will achieve this. Prior to that event an accused is likely to be released pending trial and thereafter may ensue offers to plead guilty to a lesser offense or, as in this case, a dismissal of charges.

The process that provides these opportunities for reconciling an accused's First Amendment rights regarding the religious use of peyote and the proper interests of law enforcement should not be further refined by requiring either an adversary hearing on the good faith issue prior to arrest or seizure of peyote and related religious articles, a special warrant procedure in which there would be an ex parte examination of the probable good faith of the person about to be arrested and searched, or an awkward requirement that officers must make a reasonable effort to confirm an assertion of good faith prior to formal arrest and seizure. With respect to this last alternative, it surely must be recognized that those charged with law enforcement can not be expected to be competent curbside evaluators of the good faith asserted religious beliefs or the

credibility of references supplied by the apprehended individual. To impose upon them duties of this sort, accompanied, as the plaintiff in oral argument suggested, by interim protective custody of the apprehended and impoundment of the peyote, is to impair seriously the ability to enforce the laws relating to the controlled substance, peyote, as applied to those who do not subscribe to the beliefs of the Native American Church. People v. Woody, supra, did not hold, nor suggest, that classifying peyote as a controlled substance was unconstitutional per se. An equivalent result should not be reached indirectly by the adoption of superfluous or unworkable procedures preceding arrest and seizure.

There remains only the charge that in all events the siezure of the box and Golden Eagle's personal religious articles violated the Fourth and Fourteenth Amendments. It is argued that the arresting officers could not have believed that such articles could aid in conviction. The officers, on the other hand, insist that there was a sufficient nexus between the box and religious articles and the peyote to meet the test laid down in Warden v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642,

18 L.Ed.2d 782 (1966). Although the issue is not entirely free from doubt, we hold that the arresting officers could reasonably believe that these articles would aid in the conviction of Golden Eagle. This being so, it matters not whether these articles are classified as fruits, instrumentalities, or contraband, or mere evidence that would aid in conviction.

The arrest and seizures before us in this case were not improper. The procedures which the plaintiff insists must precede arrest and seizure are not required by the First and Fourteenth Amendments. There existed probable cause for the arrest of Golden Eagle and probable cause to believe that the articles seized would aid in his conviction. In any event, defendants Peters, Heerd, Hall and Johnson acted in good faith and with probable cause in making the arrest and search under statutes that they believed to be valid. See Pierson v. Ray, 386 U.S. 547,555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1966).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GOLDEN EAGLE, also known as Lee Roy Austine,

Plaintiff,

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORNE and KIT NELSON,

Defendants.

No. F-469 Civ.

ORDER ON DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss was argued and submitted. Lee J. Sclar, Esq., appeared for plaintiff; Nelson P. Kempsky, Deputy Attorney General of the State of California, appeared for the California Highway Patrol; and Lowell T. Carruth, Esq., appeared for all other defendants.

Plaintiff's complaint alleges that the Highway Patrol stopped the car in which he

was a passenger because it lacked a light over the license plate. The driver was unable to provide satisfactory identification and the vehicle did not belong to anyone in it. When the officer asked plaintiff what was contained in the wooden box he answered "peyote".

These allegations do not state a claim on which relief can be granted as they establish that plaintiff's arrest was lawful.

Thus the first six causes of action are dismissed as to all defendants.

The Seventh Cause of Action alleges mistreatment during incarceration including kicking by a Deputy Sheriff and thus states a claim against Deputy Sheriffs Lenahan and Cooper.

The Equity Cause of Action is dismissed as to all defendants as plaintiff's remedy at law is adequate.

DATED: August 20, 1971.

M. D. Crocker
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GOLDEN EAGLE, also known as Lee Roy Austine,

Plaintiff,

v.

DEPUTY SHERIFF JOHNSON, DEPUTY SHERIFF DARWIN L. HALL, DEPUTY SHERIFF COOPER, CALIFORNIA HIGHWAY PATROLMAN PETERS, CALIFORNIA HIGHWAY PATROLMAN HEERD, SERGEANT LENAHAN, OLIVER ROBINSON, OLIVER ROSTAIN, ROBERT B. VANDERNOOR, RICHARD W. BRADSHAW, WALTER H. CONDLEY, ROBERT T. BACA, JUDGE WALTER OSBORNE and KIT NELSON,

Defendants.

CIVIL NO. F--469

ORDER FOR ENTRY OF FINAL JUDGMENT

Plaintiff's Motion for Entry of Final Judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure having duly come on for hearing on March 9, 1972, and having heard the argument of counsel appearing for the parties to this action, and considered the memoranda of points and authorities and other papers on file herein, and good cause appearing therefor,

IT IS ORDERED that a final judgment shall be entered in favor of all the defendants as to plaintiff's first six causes of aciton.

Dated: Mar. 16, 1972

M. D. Crocker
United States District Judge